SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

ZOILO MENDEZ RIOS,

Petitioner,

v.

CLARENCE K. BOWIE, ET ALS., TRUSTEES,

Respondents.

BRIEF IN SUPPORT OF FOREGOING PETITION

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is reported at 118 F. (2d) 435; it appears at page 62 of the record. The opinion of the District Court is not reported; it appears at page 14 of the record.

Jurisdiction of this Court

This action was instituted in equity before the United States District Court for Puerto Rico on January 17, 1939 on the ground of diverse citizenship of the parties (R. 1).

The District Court dismissed the complaint on the ground that the parties having provided for an unrestricted use of the right of way for railroad purposes, which is to be perpetual in character, it therefore was not their intention to change or limit the use of the right of

way to, or for the benefit of, the "Central Juncos" property (R. 23/24).

Certiorari is asked for, pursuant to section 240(a) of the Judicial Code, within three months after judgment of affirmance, March 19, 1941.

Statement of the Matter Involved

The sole question in this case is whether under the law of Puerto Rico a servitude of right of way granted and recorded in the Registry of Property over a certain servient tenement in favor of another described property as dominant tenement, may be used not only in connection with or for the benefit of the dominant tenement, but for any and all other properties of the owner thereof, because the grant, after referring to the dominant tenement stated that

> * * * the cars and engines of The Juncos Central Company being permitted in virtue of said servitude to run freely over the roads established, without any restriction whatsoever, and said railroad may be repaired and conserved as required by the necessities of the servitude.

ARGUMENT

The Circuit Court of Appeals erred in holding that the servitude of right of way granted in favor of the "Juncos Central" property, although it belongs to, and is inseparable from, said property may be used by the owners thereof in connection with, or for the benefit of, any and all other sugar centrals or properties owned by them.

The law of Puerto Rico on the subject is embodied in the following provisions of the Civil Code, 1930 edition.

The numbers given in parenthesis are those of the equivalent sections of the Spanish Civil Code.

Title VII.—Servitudes.

Chapter I.—Servitudes in General.

Article First.—The different kinds of servitudes which may be established on tenements.

Sec. 465 (Sp. 530).—A servitude is a charge imposed upon an immovable for the benefit of another tenement belonging to a different owner.

The immovable in favor of which the servitude is established is called the dominant tenement; the one subject thereto is called the servient tenement.

Sec. 466 (Sp. 531).—Servitudes may also be established for the benefit of one or more persons or of a community to whom the encumbered tenement does not belong.

Sec. 467 (Sp. none).—All servitudes which affect lands may be divided into two classes, personal and real.

Personal servitudes are those which are inseparably attached to the person in whose benefit they have been established, and which terminate with his life. Such servitudes are of three kinds: usufruct, use and habitation.

Real servitudes, also called predial servitudes, are those enjoyed by the owner of a tenement and established on another tenement in benefit of the former.

Predial servitudes are so called because, being established for the benefit of an estate, the obligations constituting it are due to the estate, and not to the person who may be the owner thereof.

Sec. 468 (Sp. 532).—Servitudes may be continuous or discontinuous, apparent or not apparent.

* * *

Sec. 469 (Sp. 533).—Servitudes are also positive or negative. * * *

Sec. 470 (Sp. 534).—Servitudes are inseparable from the tenement to which they actively or passively belong.

Sec. 471 (Sp. 535).—Servitudes are indivisible. * * *

Sec. 472 (Sp. 536).—Servitudes are established either by law or by the will of the owners. The former are called legal servitudes and the latter voluntary servitudes.

* * * * * * * *

Article Third.—Rights and obligations of the owner of dominant and servient tenements.

Sec. 479 (Sp. 543).—The owner of the dominant tenement may make at his own expense, on the servient tenement, all works necessary for the use and preservation of the servitude, but without altering it or rendering it more onerous.

Chapter III.—Voluntary Servitudes.

Sec. 530 (Sp. 594).—Every owner of an estate has a right to charge it with all the servitudes he may deem fit, and in the manner and form he may consider as best, provided he does not violate the laws or public order.

Sec. 534 (Sp. 598).—The title, and in a proper case, the possession of a servitude acquired by prescription determines the rights of the dominant tenement and the obligation of the servient tenement. In default thereof, the servitude shall be governed by such provisions of this title as may be applicable.

Manresa, one of the leading Spanish commentators whose opinion is generally followed by the Supreme Court

of Puerto Rico, states with reference to section 470 (Sp. 534), 4 Código Civil Español, 4th ed., 1920, page 610:

> El precepto del art. 534 es absoluto; no cabe excepción. En las servidumbres *reales* el beneficio en que consisten es inseparable de las fincas. Toda separación más o menos encubierta está terminantemente prohibida. El precepto de la ley 12, tit. 31, Partida 3e., encuanto a la excepción que establece sobre la servidumbre de aguas para el riego, y el num. 1 del art. 108 de la ley hipotecaria, en la parte referente a la misma excepción deben entenderse derogados.
>
> The precept of art. 534 is absolute; there can be no exception. With respect to *real* servitudes the benefit of which they consist is inseparable from the tenements. Any separation more or less hidden is definitely prohibited. The precept of law 12, tit. 31, Partida 3d., as to the exception it makes concerning the servitude of waters for irrigation, and art. 108, par. 1 of the mortgage law (P.R.) insofar as it refers to the same exception should be considered as annulled.

The Supreme Court of Puerto Rico has held in numerous decisions, amongst others:

> *Monroig* v. *Registrar,* 19 PRR 782,
> *Torres* v. *Plazuela Sugar Co.,* 24 *id.* 451,
> *Colón* v. *Plazuela Sugar Co.,* 31 *id.* 451,
> *Del Moral* v. *Muratti,* 34 *id.* 244,
> *Gonzalez* v. *Plazuela Sugar Co.,* 42 *id.* 676,
> *Martínez* v. *Central Cambalache,* 48 *id.* 208, affd.,
> *Central Cambalache* v. *Martínez,* 82 F. 2d. 37.,

that a servitude of right of way for a railroad track granted in favor of a sugar central or property upon

which the central stands, is a *real* and not a *personal* servitude, discontinuous although apparent, and hence can only be acquired or established in virtue of a public deed (escritura pública) which, to affect third persons, must be recorded in the Registry of Property. Said the court in the *Del Moral* Case, 34 PRR at 248 and 249:

> The year 1890 is of decisive importance because that was the year when the Civil Code went into effect and since that time the servitude in question could be acquired only by virtue of a title, and in this case such a means of acquisition has not even been mentioned.
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> * * * * * * * *
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> * * * Hence, travel which is merely tolerated generally continues until there is abuse, as the evidence showed there was in this case. Therefore, when one seeks to obtain an absolute and permanent right he knows that he must enter into a contract in order to acquire the right for an appropriate consideration, and the right so acquired can be secured as against third persons by recording it according to the provisions of the Mortgage Law. After 1890 the indefinite and vague conditions concerning this kind of a servitude disappeared in Porto Rico.

In *Monroig* v. *Registrar,* 19 PRR 783, the deed granted to Monroig a perpetual servitude of right of way for railroad for use in connection with the Central Juanita of Bayamón. Record thereof was denied by the Registrar on the ground that the dominant tenement had not been described in the deed. Monroig attempted to remedy the defect by executing and presenting to the Registry a subsequent deed describing the dominant tenement, record whereof was denied for various reasons. On appeal to

the Supreme Court Monroig contended that in any event the description of the dominant tenement was not necessary for the reason that the servitude had been granted in his favor and hence was a personal servitude. The court, after pointing out (p. 785) that this contention had been waived, proceeded to say (p. 786):

> * * * Apart from all this, however, there is no doubt that the servitude in question is a predial one because the deed establishing the same states that the servitude shall be used for the purpose of carrying canes to the Central Juanita and the context of the document shows that the servitude was established in benefit of the said central, therefore it is a real and not a personal servitude.
>
> This being the case, not only is it necessary to include a description of the servient estate, which was done, but also a description of the dominant estate, inasmuch as section 13 of the Mortgage Law provides that records of all servitudes shall be made on the pages reserved for the records of the two estates.

The Circuit Court of Appeals accepted, as could hardly be otherwise in the light of the foregoing authorities and of the provisions of the deed, that a *real* servitude was constituted in favor of the "Central Juanita" property. It said (R. 74; 118 F. 2d. at page 442):

> * * * The servitude is in favor of the Juncos Central property; it is attached to it. It, therefore, is a real as distinguished from a personal servitude, and can be perpetual in character. It is inseparable from the property. It cannot be conveyed without the property, nor will the conveyance of other property carry with it any right to the use of this servitude.

Nevertheless the Court went in to hold, in effect, that what amounts to a *personal* servitude was also granted The Juncos Central Company for the free and unrestricted use of the servitude over "Mercedes" in connection with any and all other properties of the grantee. It said (R. 74; 118 F. 2d. at 442):

> It is the contention of the defendants that the proper construction of the deed in the light of the Puerto Rican law is that every real servitude must be attached to some piece of real property to which it belongs and with which it passes, but that the use which may be made of this servitude must be discovered from the words of the deed. Thus they maintain that Deed No. 133 created a servitude that belongs to and is inseparable from the Juncos Central property, but the use of which is to be free and unrestricted to the owners of that property. We agree with the defendants.

This conclusion, we submit, is due to an erroneous interpretation of section 466 (Sp. 531) which is, as pointed out by the Commentators, apparently in contradiction with section 465 (Sp. 530). Scaevola discusses the subject at great length, 10 Código Civil, 3ra. ed. 1917, pages 135 *et seq.*, and concludes at page 201:

> El objeto del art. 531 (P.R. 466) es declarar que, además de las servidumbres sobre un fundo en beneficio de otro (reales), pueden constituirse tambien en favor de una persona. Refiérese, pues, su disposición a los derechos que puedan establecerse sobre un fundo en favor de una persona individual o colectiva sin relación con un predio determinado, o con relación secundaria e indirecta. Alude, en nuestro entender, a las llamadas impropiamente servidumbres de aguas, caza, leñas y pastos; a la de paso para ganados, a la novísima de teléfonos,

a algunas de utilidad pública (navegación, flotación, pesca, salvamento, sirga, saca de agua y de abrevaderos en favor de los habitantes de alguna población), y, en general, *a cualquier derecho de un uso determinado, o privación de un uso,* en pro de una o varias personas, *independientemente de la idea de un fundo.* (Last italics inserted.)

The object of art. 531 (P.R. 466) is to declare that besides the servitudes over a property in benefit of another (real servitudes), they may also be constituted in favor of a person. It refers, therefore, to the rights that may be established over a property in favor of a person, individual or collective, without relation to a certain property, or with a secondary or indirect relation thereto. It alludes, in our judgment, to what are improperly called servitudes for water, hunting, firewood and pasture; to that of passage for cattle, the recent ones for telephone, to some of public utility (navigation, floatage, fishing, salvage, towage, taking of water and of drinking troughs in favor of the inhabitants of some village) and, in general, *to any right to a determined use, or privation of an use,* in favor of one or several persons, *independently of the idea of a property.* (Last italics inserted.)

Manresa says, *op. cit.* vol. 4, page 591:

* * * Si el provecho o beneficio de la servidumbre recae en una persona por su cualidad de propietario de determinada finca, la servidumbre es *real;* si recae en una persona independientemente de su cualidad de propietario, y aún sin ser propietario de nada, la servidumbre es *personal.*

* * * If the enjoyment or benefit of the servitude falls upon (is granted) a person in virtue of his condition as proprietor of a certain property, the servitude is *real;* if it falls upon (is granted)

> a person independently of his condition as proprietor, and even without his being a proprietor of anything, the servitude is *personal.*

It is to be observed that the Puerto Rican legislature when it revised in 1902 the Spanish Civil Code that had continued in force since the American occupation, inserted a new section, 467, that was taken from section 646 of the Civil Code of Louisiana. The difference in wording is probably due to translation into Spanish and then back to the English. By that section, *supra,* it is provided that personal servitudes (1) "are inseparately attached to the person in whose benefit they have been established," (2) that they "terminate with his life", and (3) that they "are of three kinds: usufruct, use and habitation." This definition is substantially in accord with Scaevola's interpretation, *supra,* of art. 531 (P.R. 466). It would therefore seem quite clear that a right of way for the establishment and maintenance of a railroad could not be a *personal* servitude but only a *real* or *predial* servitude "enjoyed by the owner of a tenement and established on another tenement in benefit of the former." (Sec. 467, *supra,* third paragraph.)

The learned Appellate Court reached the conclusion that it was the intention of the parties to create a general easement not only for the benefit of any and all other properties of the grantee, The Juncos Central Company, but even for the benefit of several other sugar centrals and the numerous properties exploited in connection therewith. This because the deed provides that the cars and engines of The Juncos Central Company may "run freely over the roads established without any restriction." (R. 74, 118 F. 2d. 442, pars. 11-13.) Let us quote the whole sentence call-

ing attention with italics to certain provisions apparently overlooked by the Court of Appeals:

> * * * The aforesaid servitude, as has been stated, is perpetual in character and is *constituted in favor of the rural property described in the third paragraph of the expositive part* (of this document) *as dominant tenement,* and which is owned by The Juncos Central Company, the cars and engines *of The Juncos Central Company* being permitted in virtue of *said servitude* to run freely over the roads established, without any restriction whatsoever, and said railroad may be repaired and conserved as required by the necessities of the service.

We submit that it is not logical or reasonable to say that the words granting the right to run the rolling stock freely and without restriction whatsoever, must have been intended to grant a right to unlimited use of the servitude in connection with other than the dominant tenement, when the very clause refers to the use of "*said servitude*". What servitude? The servitude just granted, by the first words of the sentence,—in favor of the rural property ("Central Juncos") as dominant tenement. That predial servitude is not limited as to the number of trains that may pass daily, what they may carry, or otherwise. An absolute, unrestricted use was granted of "said servitude", that is, of the right of way in favor of the dominant tenement, "Central Juncos".

We submit it is more reasonable to believe that the parties inserted those words to avoid any controversy in the future, and that they did not intend thereby to grant a separate, distinct, *personal* servitude to the grantee, The Juncos Central Company, for use of the right of way in connection with other properties which were in no way connected with, or of benefit to, the dominant tenement,

"Central Juncos". The circumstance that the grantee without those words would have been able to use the road without any restriction whatsoever no more justifies the changing of the servitude from *predial* to *personal,* from the dominant tenement to others, than the succeeding and final words of the sentence:

> * * * and said railroad may be repaired and conserved as requested by the necessities of the service.

The owner of the dominant tenement is given this right by Section 479 of the Code, *supra.* The insertion of these words was unnecessary. By so doing was it the intention of the parties to create an additional right or servitude, or was it not rather that the notary saw fit to state in the deed general rights that correspond to the owner of the dominant tenement unless those rights are restricted by the grantor?

We submit the court has misinterpreted what Scaevola says about the will of the parties being liberally construed. That author says, Vol. 10, 3rd ed. (1917), pages 794/795:

> * * * El título de constitución de servidumbre puede referirse a acto *inter vivos o mortis causa;* si lo primero, creada aquella por convenio entre los respectivos interesados, ya dispone el Art. 1.255 (P.R. 1207) del Código que los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público; y la jurisprudencia del Tribunal Supremo viene continuamente repitiendo que el contrato es ley para los contratantes, vigente y respetable en todo caso, si se contiene dentro de los expresados límites, y aún enfrente de las disposiciones del Derecho positivo que no tengan carácter público y de imposición

general. Otro tanto procede decir del testamento como modo de crear las servidumbres; la voluntad del testador, expresada con sujeción a las reglas cardinales que marcan las leyes, puede determinar libremente cómo haya de disponerse y distribuirse el patrimonio del testador después de su muerte; porque es también, para el heredero y sucesores singulares, ley lo que cada uno deje ordenado en tal sentido testamentariamente.

El mismo principio, ampliamente liberal, que inspira los usufructos convencionales (servidumbre personal tipo) rige para las servidumbres prediales voluntarias. Lo que las partes estipulen, el conjunto de los derechos y obligaciones convenido por los dueños, dominante y sirviente, constituirá su estatuto, porque en él van comprendidos todos los modos y contingencias posibles, así en su origen, vida y ejercicio, como en su extinción. * * *

* * * Por esto, el artículo 598 (P.R. 534) debe ponerse en relación, y virtualmente lo está, con el 594 (P.R. 530), que se refiere, en general, al *establecimiento* de servidumbres (dentro de cuya idea están comprendidas indudablemente las de derechos *del predio dominante* y obligaciones del sirviente), según el cual, al fijar libremente los inresados tales derechos y obligaciones, no podrán contravenir las leyes ni el orden público.

* * * The title of constitution of servitude may be an act *inter vivos or mortis causa;* If it is the first, created by agreement between the respective interested parties, Art. 1255 (P.R. 1207) of the code provides that the contracting parties may establish the terms, clauses and conditions which they deem advisable, provided they are not contrary to the laws, morality or public order; and the jurisprudence of the Supreme Court is continually repeating that the contract is the law for the contracting parties, in force and to be respected

> in every case, and even as against express provisions of positive law which is not of a public character and generally imposed. The same may be said of a will as a method of creating servitude; the will of the testator, expressed in subjection to the cardinal rules set forth by law, may freely determine how the estate of the testator is to be disposed of and distributed after his death; because what one has provided in a testamentary sense is also the law for the heir and successor.
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> The same very liberal principle which governs contractual usufructs (personal servitude type) governs voluntary real property servitudes. What the parties stipulate, the combination of rights and obligations agreed upon by the dominant and servient owners, constitutes their statute, because therein are included all of the possible methods and contingencies, both in their origin, duration, and execution, and in their extinction. * * *
>
> For this reason, Article 598 (P.R. 534) should be considered and virtually is, in relation with Art. 594 (P.R. 530) which refers, in general, to the *establishments* of servitudes (within which idea are undoubtedly included the rights of the dominant tenement and the obligations of the servient tenement) in accordance with which when the interested parties liberally fix such rights and obligations they cannot violate the laws nor public order.

The foregoing language is used by the learned author in commenting upon articles 594 and 598 of the Spanish Code (P.R. 530 and 534, *supra*). What we understand him to say is that in accordance therewith, as also with the general provisions of article 1255 (P.R. 1207), the owner of an estate has complete liberty to create thereon such servitudes as he may deem fit, so long as they are not in contravention of the law. But nothing is stated to the effect that the provisions of such contract will be liberally

construed against the grantor. This would be directly contrary to the rule established by the Supreme Court of Spain that all limitations upon the right of ownership shall be *strictly construed.* See 4 Manresa *op. cit.* (4th ed. 1920) at page 594, viz.:

> El art. 531 (P.R. 466), como todos los que implican gravamen, debe interpretarse en sentido restrictivo. Por eso el Tribunal Supremo, en sentencia de 30 de Noviembre de 1908, declara que el derecho concedido a una persona para usar el balcón de una casa en las fiestas y solemnidades del pueblo, y para designar otras personas que aprovechasen ese beneficio, no puede considerarse extensivo al administrador de la persona o entidad a cuyo favor se constituyó.
>
> Art. 531 (P.R. 466) as all others that create charges (liens) should be strictly construed. For this reason the Supreme Court, in judgment of the 30th of November, 1908, declares that the right granted to a person to use the balcony of a house during festivals and other solemnities of a town, and to designate other persons who may take advantage of that use, cannot be considered as extended to the administrator of the person or entity in whose favor it was granted.

The language of the Supreme Court in that case was as follows (112 Jur. Civ. p. 802, Cas. No. 102, at p. 818):

> Considerando que dada la naturaleza del expresado gravamen, que no denomina expresamente la ley, limitativo del derecho de propiedad, preciso es no concederle mayor extensión que la que aparece del texto literal del título que lo estableció, respetando el principio de que la servidumbre no se puede aumentar o agravar en perjuicio del dueño del predio sirviente, * * *

> Considering that, due to the nature of the said charge (lien), not expressly named in the law, which restricts the right of property, it is necessary not to give it further extension than that which appears literally in the text of the title by which it was established, thereby respecting the principle that a servitude cannot be extended or burdened in prejudice of the owner of the servient tenement, * * *

This is the law of Puerto Rico. This is the law that should have been applied by the lower courts as held in repeated decisions of this Honorable Court from *Romeu* v. *Todd* (1907), 206 U. S. 358, to *Bonet* v. *Texas Co.* (1940), 308 U. S. 463. In the former it was said at page 369:

> * * * Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to reserve to the people of that island the system of local law to which they have been accustomed. * * *

And in *Díaz* v. *Gonzalez* (1923), 261 U. S. 102, the Court, speaking through Mr. Justice Holmes, further said at page 105:

> This court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. (Citations) This is especially true in dealing with the decisions of a court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, vary-

> ing emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. * * *

In accordance with the Civil Code of Spain and of Puerto Rico, and the interpretation thereof by the Commentators and by the Supreme Court of Puerto Rico, it is manifest that by the deed of May 22, 1917, solely a predial servitude was constituted in favor of the "Central Juncos" property as dominant tenement and no right was thereby granted to use the servitude or railroad in connection with other properties belonging to the owner of said dominant tenement.

The fact that the railroad had already been installed across the servient tenement for a long time prior to the execution of the deed, and that it had been put to wide use prior thereto, cannot sustain the interpretation given to the deed by the Hon. Circuit Court of Appeals because such use had always been in connection with the "Central Juncos" property. Everything carried across that right of way not only prior to the execution of the deed in 1917, and up to the year 1928, was for use on said property or for the growing of sugar canes on other properties of the grantee or "colonos" which canes were ground at the "Central Juncos". But in the year 1928 the United Porto Rican Sugar Company acquired sustantially all of the assets of The Juncos Central Company and of several other sugar companies and connected the railroads of these companies into one system. It was then that the use of this servitude was radically increased, the major part of the sugars produced at three other mills, centrals "Cayey", "Defensa" and "Santa Juana", being thereafter carried

from said mills over the "Mercedes" property to the port of Humacao, and large quantities of fertilizers and other materials carried in the opposite direction from Humacao Playa to said mills. (See Opinion, R. 4; 118 F. 2d. 438.) No such use was made of the servitude prior to May 22, 1917, and it was certainly not contemplated by the parties.

However, if we should assume that by the words "without any restriction whatsoever" the parties meant a use other than in connection with the dominant tenement, then to that extent the servitude was certainly not *predial,* it must have been a *personal* servitude. In such event it could be enjoyed exclusively by The Juncos Central Company.

Conclusion

WHEREFORE, it is respectfully submitted that the decision of the Circuit Court of Appeals should be reviewed by certiorari and reversed.

Respectfully submitted,

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Counsel for Petitioner.

San Juan, P. R.,
June 11, 1941.